**RINOL MALAYSIA SDN BHD**

**v.**

**MBT (MALAYSIA) SDN BHD**

HIGH COURT MALAYA, SHAH ALAM
ZULKEFLI AHMAD MAKINUDIN J
[ORIGINATING SUMMONS NO: MT4-24-1523-2001]
29 JANUARY 2002

***CIVIL PROCEDURE:*** *Injunction - Quia timet injunction - Application for - Whether there was bona fide dispute - Whether there was proof of imminent danger and apprehended damage - Whether injunction to be granted*

The defendant issued a notice under s. 218(2)(a) of the Companies Act 1965, demanding the sum RM698,493.30 from the plaintiff. This was an application by the plaintiff for an injunction to restrain the defendant from presenting a winding-up petition against it pursuant to the said notice. The defendant applied to have the plaintiff's affidavit struck out on the ground that O. 41 rr. (5) and (6) Rules of the High Court 1980 ('the RHC') had not been complied with.

**Held:**

**[1]** The defendant's application to strike out the plaintiff's application was inherently defective. It should have applied to have the alleged offending paragraphs struck off instead of the whole affidavit. It had not also established that the alleged offending paragraphs had tainted the rest of the plaintiff's affidavit such that the whole of the plaintiff's affidavit should be struck out. (p 67 e-f & g)

**[2]** The injunction sought by the plaintiff was merely sought to prevent the defendant from commencing winding-up proceedings against it pending the defendant's claim and the plaintiff's counter-claim to be decided by the court. The proceedings do not end with the injunction being granted. Thus, the plaintiff was entitled to rely on O. 41 r. 5(2) of the RHC. (p 67 g-i)

**[3]** The plaintiff's second affidavit was not an attempt to cure the first affidavit as alleged by the defendant as there were no defects to cure in the first place. It sought to clarify and amplify the deponent's averments in the plaintiff's first affidavit and to explain the usage of certain words as the events concerned took place a long time ago. (p 68 d-e)

**[4]** Before the defendant could be legally entitled to present a winding-up petition against the plaintiff, it must be proved that there was a debt due and owing by the plaintiff. This, the defendant had not shown. Instead, it exhibited an intention to intimidate the plaintiff into paying the alleged debt as it was well understood that a winding-up petition would have adverse consequences against the plaintiff's business and reputation. (pp 69 a & 70 a-b)

**[5]** The plaintiff had a *bona fide* dispute as to the amount claimed by the defendant. This was further fortified by the fact that the plaintiff had a counter-claim that was higher than the defendant's claim. The defendant was not entitled to present a winding-up petition against the plaintiff. (p 71 b-c)

**[6]** The nature of the injunction sought by the plaintiff was that of a *quia timet* injunction. It is normally granted to prevent a wrong or damage from being done. The plaintiff would suffer irreparable damage and harm to its reputation and business if a winding-up petition was granted. (p 71 e)

**[6a]** This case came within the principles upon which a *quia timet* injunction would be granted to the plaintiff. There was proof of imminent danger to the plaintiff even if no actual damage was proved and the apprehended damage would be very substantial. (p 71 g)

*[Plaintiff's application granted. Defendant's application dismissed with costs.]*

**Case(s) referred to:**

*Fletcher v. Bealey [1885] 28 Ch D 688* ***(refd)***
*Hooper and Rogers [1975] 1 Ch D 43* ***(refd)***
*Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 2 CLJ 649; [1988] 1 CLJ (Rep) 618* ***(refd)***
*Lebbey Sdn Bhd v. Chong Wooi Leong & Anor [1994] 3 AMR 42* ***(refd)***
*Malayan Flour Mill Bhd v. Raja Lope & Tan Co [2000] 7 CLJ 288* ***(refd)***
*Mann v. Goldstein [1968] 2 All ER 775* ***(refd)***
*Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd [2000] 6 CLJ 290* ***(refd)***

**Legislation referred to:**

Companies Act 1965, s. 218(2)(a)
Rules of the High Court 1980, O. 41 rr. 5(1), (2), 6

*For the plaintiff - Gita Menon; M/s Choong & Co*
*For the defendant - Lance Rozario; M/s Rina Noor & Co*

*Reported by M Maheswaran*

## JUDGMENT

**Zulkefli Ahmad Makinudin J:**

The plaintiff in its originating summons dated 22 May 2001 ("encl. 1") has applied for the following reliefs:

(i) that the defendant be restrained by an injunction from presenting a petition for winding up against the plaintiff upon expiry of the statutory notice dated 9 May 2001 pursuant to s. 218 of the Companies Act 1965 which was served on the plaintiff on 9 May 2001 until the claim which is stipulated in the said notice and that which is disputed by the plaintiff and a counter-claim by the plaintiff against the defendant is determined and/or resolved by this honourable court pursuant to the civil suit filed by the plaintiff against the defendant; or

(ii) in the event a petition for winding up has been filed, the defendant be restrained by an injunction from serving the same on the plaintiff or any other party as prescribed by the Winding Up Rules 1972 to be served until the plaintiff's abovementioned civil suit filed herein is determined and/or resolved by this honourable court; or

(iii) in the event a petition for winding up has been served by the defendant, an injunction to restrain the defendant from advertising the petition and from further proceeding with the petition until the claim as stipulated in the statutory notice issued pursuant to s. 218 of the Companies Act 1965 and that which is disputed by the plaintiff and which the plaintiff has a counter-claim, are determined and/or resolved by this honourable court;

(iv) the costs of the application be borne by the defendant; and

(v) such further and/or other relief as this honourable court deems fit and proper to grant.

The grounds of the plaintiff's application are as follows:

(i) the defendant has by a notice dated 9 May 2001 pursuant to s. 218(2)(a) of the Companies Act 1965 demanded from the plaintiff a sum of RM698,493.30 being allegedly the value of goods purportedly supplied by the defendant to the plaintiff.

(ii) The abovementioned notice was served on the plaintiff's registered office on 9 May 2001;

(iii) The defendant even before service of the said statutory notice knew and in fact had been informed by both the plaintiff and its solicitors that the defendant's claim is not only disputed but that the plaintiff has a counter-claim against them in a sum higher than the defendant's claim;

(iv) The plaintiff disputes the defendant's claim on the basis that the defendant had substantially overcharged for the prices of goods supplied to the plaintiff by the defendant despite an agreement from the defendant not to do so;

(v) The plaintiff also has a counter-claim against the defendant for unlawful termination of an agreement called the sole applicatorship agreement, which agreement is the basis for the sale and supply of certain types of goods from the defendant to the plaintiff and which goods form the subject matter of the defendant's claim against the plaintiff under the statutory notice;

(vi) the plaintiff has filed a civil suit against the defendant in the Shah Alam High Court for losses and/or damages suffered by the plaintiff as a result of the abovementioned unlawful termination and such civil suit has yet to be disposed off;

(vii) as a result of the *bona fide* dispute to the defendant's claim and the existence of a counter claim against the defendant which is higher than defendant's claim, the plaintiff has the right to restrain the defendant from presenting a winding up petition or if one has been presented, to restrain the defendant from serving and/or advertising the same;

(viii) the defendant's threat of presenting a winding up petition as stated in the statutory notice is sufficient to constitute a cause of action;

(ix) unless the defendant is restrained as aforesaid, the plaintiff will suffer irreparable damage;

The defendant meanwhile by way of summons in chambers dated 4 July 2001 ("encl. 5") has applied for the following reliefs:

(i) that the affidavit of Then Liat Nyap affirmed on 22 May 2001 ("the plaintiff's affidavit") in support of the plaintiff's application in encl. 1 be dismissed and/or be struck out pursuant to O. 41 r. (5) and (6) of the Rules of the High Court 1980.

(ii) the costs of the application be borne by the plaintiff.

The grounds of the defendant's application are as follows:

(i) the plaintiff's affidavit did not comply with O. 41 r. 5 and r. 6 of the Rules of the High Court 1980;

(ii) certain paragraphs and exhibits in the plaintiff's affidavit are scandalous, irrelevant and/or oppressive pursuant to O. 41 r. 5 of the Rules of the High Court 1980;

(iii) there is a conflict whether the statements contained in the plaintiff's affidavit are within the knowledge of the deponent.

I shall first deal with the defendant's application in encl. 5. The provisions of O. 41 r. 5 and O. 41 r. 6 of the Rules of the High Court 1980 are reproduced as follows:

> 5. Contents of affidavit (O. 41 r. 5)
>
> (1) Subject to Order 14 rules (2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38 rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.
>
> 6. Scandalous, etc matter in affidavits (O. 41 r. 6)
>
> The court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

Having studied the affidavit of the Then Liat Nyap filed in support of the plaintiff's application, I find that there are no merits whatsoever in the defendant's application to strike out the said supporting affidavit of the plaintiff. It is my finding that the defendant's application is inherently defective. The defendant has applied for the whole of the plaintiff's affidavit to be struck out instead of just the alleged offending paragraphs. For the defendant to be successful, the defendant must thereby show that all 34 paragraphs of the plaintiff's affidavit or at least a high proportion thereof are in breach of O. 41 r. (5) and (6) of the Rules of the High Court 1980. The defendant has failed to do so. In the affidavit of Lim Choong Meng in support of the defendant's application affirmed on 4 July 2001 he has only alluded to paras. 1 to 9 of the plaintiff's affidavit being defective. In addition, the defendant has not established or shown that the alleged offending paragraphs have tainted the rest of the plaintiff's affidavit such that the whole of the plaintiff's affidavit should be struck out.

I also find that the action taken by the plaintiff in this case is interlocutory in nature as the injunction sought is merely to prevent the defendant from commencing winding-up proceedings against the plaintiff pending the defendant's claim for the amount stated in the statutory notice dated 9 May 2001 as well as the plaintiff's counter-claim against the defendant being decided by the court. The proceedings do not end with the injunction being granted. On this ground I am of the view that the plaintiff is entitled to rely on O. 41 r. 5(2) of the Rules of the High Court 1980. It can be seen that

there are no less than 12 exhibits annexed to the plaintiff's affidavit; a high proportion of which are the defendant's own correspondence/documents. These exhibits in my view constitute the source of information and belief of Then Liat Nyap, the deponent to the plaintiff's affidavit. It is also my view that even if this court is to hold that these proceedings are not interlocutory proceedings, I would still regard that Then Liat Nyap as a deponent to the plaintiff's affidavit has the personal knowledge of the averments in the plaintiff's affidavit; if not all of them, at least the majority and the material averments therein. By an affidavit in reply affirmed on 30 August 2001 (hereinafter referred to as "the plaintiff's second affidavit"), Then Liat Nyap has explained and clarified at great length that he has personal knowledge of his averments in *inter alia* paras. 3 to 9 of the plaintiff's first affidavit and even substantiated it with the necessary exhibits as well as explaining his usage of certain words in the plaintiff's affidavit.

The defendant has contended that the plaintiff's second affidavit is an attempt to cure the plaintiff's first affidavit. I am of the view that this is not so. The plaintiff's second affidavit merely explains and amplifies the plaintiff's first affidavit and makes it clearer. It is not meant to cure any alleged defects in the plaintiff's first affidavit as there are no defects to cure in the first place. The plaintiff's second affidavit was not only to clarify and amplify the deponent's averments in the plaintiff's first affidavit, but to explain as to his usage of certain words. It is a fact that certain events relating to the parties took place a long time ago and it is perfectly logical and natural as well as responsible on the part of the deponent to have to reexamine and restudy the relevant documents in the possession of the plaintiff to refresh his memory.

Even if the court is not to take cognisance of the plaintiff's second affidavit, I am of the view that the plaintiff's first affidavit in support of the application by itself establishes and shows the merits of the plaintiff's claim. I also take the view that even if there are any offending paragraphs in the plaintiff's first affidavit which do not comply with O. 41 r. 5(1) and/or (2) of the Rules of the High Court 1980 the offending paragraphs do not go to the crux of the case and the remaining paragraphs are more than adequate and sufficient to justify the plaintiff's claim. A close examination of the plaintiff's first affidavit clearly shows that the offending paragraphs are only confined to paras. 4 to 12 of the plaintiff's affidavit which sets out the historical aspects of the case. The purpose of those paragraphs were to give a clearer idea and picture of the background facts leading to this case and do not go to the crux of the plaintiff's claim.

On the merits of the plaintiff's application I am of the view that before the defendant is entitled in law to present a winding up petition against the plaintiff, it must first prove that there is a debt due and owing by the plaintiff to it. In support of this proposition I would like to refer to the case of *Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd* [2000] 6 CLJ 290 wherein his Lordship Mohd Ghazali J at p. 298 had this to say:

> A winding up petition is not a legitimate means of seeking to enforce payment of a debt which has not been clearly determined otherwise the courts, when faced with a winding-up petition of a debt which is not based upon a judgment debt, would first have to establish the debt due, *viz*., whether the alleged debt claimed is the actual amount owing based on the evidence available. The courts which hear winding up petitions will then be put to unnecessary strain if a petition to wind up is based not upon a judgment debt but purely on a s. 218(2)(a) notice. If the debt stated in the notice is disputed, the court must, at the outset, proceed to hear the dispute on the debt first in order to determine the sum actually owing by the respondent to the petitioner. Only when the debt is determined can the court proceed to hear the winding up petition. Is this the proper course that the court should take when faced with such a situation? What if the respondent applies to court for a stay of the winding up petition at that stage on the ground that he wished to appeal against the finding of the court on the debt alone? For the court to proceed to hear the winding up petition without giving the respondent an opportunity to appeal on the finding of the court in relation to the debt would be unthinkable. For the reasons stated above, I dismissed this petition with costs.

In the case of *Malayan Flour Mill Bhd v. Raja Lope & Tan Co* [2000] 7 CLJ 288 on the same point his Lordship Ramly Ali JC had stated as follows:

> In order for a person to initiate winding up notice under the section, he must be a 'creditor' and the debt must be 'due'. Persons not within the ambit of the said section cannot initiate any petition for winding up. Therefore, so far as material to our case, if the defendant is not a 'creditor', it is not entitled to present or advertise its petition or apply for winding up order and it has no *locus standi*. Since the debt upon which the defendant founded its petition was substantially disputed by the plaintiff, the issues whether the defendant is a 'creditor' and whether the debt is 'due' need to tried and established first.

In this present case I find that the defendant has not tendered any evidence whatsoever to substantiate and/or prove that the plaintiff is indebted to it in the sum of RM698,493.30 or at all. All that the defendant has done is only to make bare and unsubstantiated allegations. The defendant had the opportunity to tender documentary evidence to support its claim against the plaintiff but has not done so in any of the affidavits filed by the defendant herein. I also find that the defendant has not obtained any judgment whatsoever against the plaintiff for the amount claimed in the sum of RM698,493.30 or at all. The defendant has not filed any legal proceedings whatsoever against

the plaintiff for the alleged outstanding sum but has chosen instead to straight away threaten to commence winding up proceedings against the plaintiff. This is especially repugnant given the fact that the defendant has not adduced any documentary evidence whatsoever to prove its claim other than a bare allegation. It is my view that the defendant's intention in commencing winding up proceedings against the plaintiff is to intimidate the plaintiff into paying the alleged outstanding sum as the defendant knows fully well the adverse consequences such a winding up petition would have on the plaintiff's business and reputation.

I am of the view that the petition for winding up cannot be resorted to settle disputed debts. The proper course for the defendant is to file a civil suit for determining the disputed claims. If the defendant intends to commence winding up proceedings against the plaintiff, the burden of proof is on the defendant to first establish that there is a debt due and owing to it by the plaintiff which the defendant has failed to do in this case. It is not for the plaintiff to prove that there is no outstanding sum due and owing by it to the defendant. It is my finding that the plaintiff has a *bona fide* dispute to the amount claimed by the defendant. The plaintiff has alleged that the defendant has substantially overcharged for the price of goods supplied by it to the plaintiff. In such an event, the legal position is very clear in that the defendant is not entitled to present a winding up petition against the plaintiff. On this point I would like to refer to the case of *Mann v. Goldstein* [1968] 2 All ER 775 wherein his Lordship Ungoed-Thomas J *inter alia* at p. 775 had this to say:

> … it is an abuse of the process of the court to prosecute a winding-up application otherwise than in accordance with the legitimate purpose of such a process. The legitimate purpose of such a process is to wind-up a company on a ground specified in the Companies Act, 1948 which, so far as material to this case, is the ground that it is unable to pay its debts. It is not the legitimate purpose to decide whether a petitioner claiming to a creditor, is a creditor because s. 224 makes it a pre-requisite that he should be a creditor before he is even entitled to present a petition at all and before any consideration of the company's insolvency can become relevant. So, in my view, when a petitioning creditor's debt is disputed on such substantial ground this court should restrain the prosecution of the petition as an abuse of the process of the court even though it should appear to the court that the company is insolvent.

The case of *Mann and Goldstein* was cited with approval in the case of *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd* [1988] 2 CLJ 649; [1988] 1 CLJ (Rep) 618 wherein his Lordship Zakaria Yatim J at p. 651 (p. 620) had stated as follows:

> It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and

> the respondent company is a debtor. A creditor is a person who could enforce his claim against the company by an action of debt and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract. Where a petition is based on a debt which is disputed on substantial grounds; the petitioner is not a creditor (see *R Lympne Investment Ltd* at p 389). If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding-up order. It has not *locus standi* and the petition must fail.

Another reason why it can be said that there is a *bone fide* dispute as to the amount claimed by the defendant is because the plaintiff has a counter-claim against the defendant which is higher than the defendant's claim for the unlawful termination of an agreement called the sole applicatorship agreement, which agreement is the basis for the sale and supply of certain types of goods from the defendant to the plaintiff and which goods form the subject matter of the defendant's claim against the plaintiff under the statutory notice. The plaintiff has filed a civil suit against the defendant in the Shah Alam High Court for losses and/or damages suffered by the plaintiff as a result of the abovementioned unlawful termination and the said civil suit has yet to be disposed off.

The plaintiff has a valid cause of action against the defendant. Unless the defendant is injunct from commencing winding up proceedings against the plaintiff, the plaintiff will suffer irreparable damage and harm to its reputation and business. It is to be noted that the nature of injunction sought for by the plaintiff in the present case is a *quia timet* injunction. A *quia timet* injunction is normally granted to prevent a wrong or damage being done. In this particular case, the plaintiff will suffer an irreparable damage and harm to its reputation and business if a winding up petition is presented against it. Such winding up petition advertised in the newspapers would attract the attention of the public at large, especially the plaintiff's bankers and customers who may then jump to the wrong conclusion that the plaintiff is unable to pay its debts and thereby suspend and/or terminate their banking/business relationship with the plaintiff. I am of the view that this case comes within the principles upon which a *quia timet* injunction will be granted as there is proof of imminent danger to the plaintiff even if no actual damage is proved and the apprehended damage will be very substantial. In support of this contention I would like to refer to the case of *Hooper and Rogers* [1975] 1 Ch D 43 wherein the Court of Appeal approved the principles laid down in the case of *Fletcher v. Bealey* [1885] 28 Ch D 688 and held that:

> There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial.

In the local case of *Lebbey Sdn Bhd v. Chong Wooi Leong & Anor* [1994] 3 AMR 42 his Lordship Mahadev Shankar J *inter alia* held that where the apprehensions of damage are proven to be imminent the court would grant a *quia timet* injunction.

For the above stated reasons I thereby granted an order in terms of the reliefs prayed for by the plaintiff as in encl. 1 and dismissed the defendant's application as in encl. 5 with costs.